BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the Supreme Court of Illinois is reported in 376 Ill. 517. This is the opinion of June 12, 1941, modifying unreported opinion filed April 15, 1941, denying petitioners' petition for rehearing, and reversing unreported opinion filed December 16, 1940. The opinion of the Appellate Court of Illinois, Second District, is reported in 303 Ill. App. 430.

II.

Jurisdiction.

(1) The date of the decree to be reviewed is June 12, 1941; rehearing denied the same date.

(2) The statutory provision sustaining the jurisdiction of this Court is Section 237 (b) of the Judicial Code as amended by Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. C. A., Title 28, Section 344). Throughout the course of this litigation in the state courts of Illinois, the petitioners have preserved the constitutional question of due process of law under the Fourteenth Amendment to the Constitution of the United States. The claims as originally filed presented this ground, which has been preserved in every succeeding step of the litigation.

(3) Cases typical of those believed to sustain jurisdiction are as follows:

Standard Oil Co. v. *Missouri,* 224 U. S. 270, 281.

Roller v. *Holley,* 176 U. S. 407, 20 S. Ct. 410, 44 L. Ed. 520.

Nord v. *Griffin,* (C. C. A. 7) 86 Fed. (2d) 481; Cert. Den. 57 S. Ct. 611, 300 U. S. 673, 81 L. Ed. 879.

Boynton v. *Moffat Tunnel Improvement District,* (C. C. A. 10) 57 Fed. (2d) 772; Cert. Den. 53 S. Ct. 20, 287 U. S. 620, 77 L. Ed. 538.

III.

Statement of the Case.

Petitioners believe the recital of facts contained in the "Summary Statement" in the accompanying petition for writ of certiorari constitutes a sufficient statement to serve this Court in its consideration of this brief. The same is, therefore, hereby adopted and made a part hereof.

IV.

Specification of Errors.

The errors in the judgment of the Supreme Court of the State of Illinois, which are relied on by petitioners in this case, are set out in the statement of "Reasons Relied On for the Allowance of the Writ" in the accompanying petition for writ of certiorari. Petitioners will rely upon and urge before this Court all errors therein assigned. Same are, therefore, hereby adopted and made a part of this brief.

V.

ARGUMENT.

Summary.

1. **Reasonable Notice and an Opportunity to Be Heard Are the Essence of Due Process, and Petitioners Had No Notice and No Hearing and Have Been Denied Due Process.**

2. **Petitioners Do Not Stand in the Position of Creditors Entitled Merely to a Pro Rata Share in the Assets of the Peoria Life Insurance Company, Since the Receivership of That Company Was Not a Liquidation in the Sense of a Sale of Assets and a Pro Rata Distribution to Creditors.**

3. **But Even in the View of This Case That the Receivership of the Peoria Life Was a True Liquidation, Petitioners Have Been Deprived, Without Due Process, of Their Rights as Creditors.**

4. **Each Petitioner Had an Absolute Vested Right in His Renewal Commissions in the Amount Fixed by His Agency Contract on Every Policy Written by Him, From the Moment the Policy Was Issued by the Company.**

(a) *This has been established as the law in similar insurance cases.*

(b) *The right of an insurance agent to his renewal commissions is so definitely vested at law that his trustee in bankruptcy or an assignee for benefit of creditors can demand payment of them.*

(c) *Petitioners have a property right in the nature of an equitable lien which attaches to each premium on policies written by them, as it is paid, to the extent of petitioners' renewal commission interest therein.*

(d) *As either respondent receives premiums on policies of insurance written by petitioners an implied trust is created, and such respondent becomes a trustee for the benefit of petitioners of their renewal commission interest in such premiums.*

5. Petitioners' Rights Were Not Dependent on the Continued Existence of the Peoria Life Insurance Company as Such, or Upon Any Other Person or Thing the Destruction of Which Could Destroy Petitioner's Rights.

1. Reasonable Notice and an Opportunity to Be Heard Are the Essence of Due Process, and Petitioners Had No Notice and No Hearing and Have Been Denied Due Process.

The Circuit Court of Peoria County, Illinois, in its decree entered March 4, 1938, in this case (Abst. 160) expressly found as follows:

> "That there was no attempt made to serve the claimants [petitioners here] with summons or written notice of the proposed entry of a decree at any time before the decree of August 22, 1934, approving the reinsurance contract entered into herein, but, however, that all of the creditors herein knew of the receivership proceedings pending in this court prior to the decree of August 22, 1934."

Here is an express finding by the trial court, and there is no contradictory evidence, that petitioners were not served with any process or any notice prior to the hearing at which a decree was entered which, so the Supreme Court of the State of Illinois now says, destroyed their rights.

That petitioners had general knowledge that receivership proceedings were pending is admitted, but it is also undenied by all parties that petitioners had no knowledge that any specific decree which would affect their vested interests would be entered on that day or at any other time. The general knowledge of a receivership proceeding to which petitioners were not parties is not sufficient where property rights are involved. The law insists that where property rights are at stake the courts must insure the fact that those parties having a vested interest are fully informed and have an opportunity to be heard before any valid decree can be entered affecting their rights.

The decree of August 22, 1934 (Abst. pp. 45-48), entered nine months after a receiver was appointed for the Peoria Life,

(a) approved the Reinsurance Agreement subsequently entered into by the Alliance Life and the Receiver of the Peoria Life (Par. 4 (a), Abst. 46);

(b) found that the contracts of insurance of the Peoria Life "* * * are hereby revived and renewed * * *" (Par. 3, Abst. 45);

(c) decreed: "That all contracts, written or oral, entered into by the Peoria Life Insurance Company for the services of persons to act as agents, managers or supervisors, or to sell contracts of insurance or collect premiums thereon due to the Peoria Life Insurance Company, be, and the same are, and each of them is hereby disaffirmed as of November 15, 1933, the date of the entry of order of liquidation in the above entitled cause and the date of the appointment of the receiver" (Par. 4 (e), Abst. 46).

The Reinsurance Agreement approved by the above mentioned decree was subsequently signed in the form approved, on October 4, 1934, by the Alliance Life and by the Receiver of the Peoria Life. In that Agreement (Abst. 51-62) among other things it was provided that,

(a) "The Company [Alliance Life] does hereby reinsure and assume as of November 15, 1933 (subject to the liens, terms, conditions and provisions, and only to the extent herein specifically provided) the liability of the Peoria Life under all policies and contracts of insurance * * * issued or assumed by the Peoria Life and outstanding and in force on the books and record of the Peoria Life on November 15, 1933 * * *" (Par. 2, Abst. 52).

(b) "The Company [Alliance Life] does not assume any obligation under any contract heretofore made by the Peoria Life with any agent (regardless of the classification), manager or supervisor, or with any other person, persons, or corporation for personal service." (Par. 37, Abst. 59.)

(c) The Receiver should make transfer to the Alliance Life of the assets of the insolvent company, retaining, however, sufficient funds to satisfy the expenses of receivership and the claims of dissenting policy holders and other creditors or claimants; and it was further provided that if the Receiver should transfer to the Alliance Life a larger amount than it was entitled to receive the Receiver's deficiency should be made up by a return of funds from the Alliance to the Receiver. (Par. 27, Abst. 57.)

(d) "If any clause, sentence, paragraph or part of this agreement shall be adjudged by any court of competent jurisdiction to be invalid or unconstitutional, such judgment shall not affect, impair, invalidate or nullify the remainder of this agreement, but the effect thereof shall be confined to the clause, sentence, paragraph or part thereof immediately involved in the controversy in which such judgment or decree shall be rendered." (Par. 56, Abst. 62.)

To sum up the matter, as is said in Cooley, *Constitutional Limitations* (8th Ed.), page 774:

> "There is no rule or principle known to our system, under which private property can be taken from one

person and transferred to another, for the private use and benefit of such other person, whether by general law or specific enactment."

It is submitted that the case of these petitioners involves the deliberate action of a court of equity in destroying vested property rights of petitioners without any oral or written notice, service or process of any kind and an attempt by decree to terminate the interest of petitioners in a future income guaranteed under the provisions of their agent's contracts recognized by the Peoria Life in cases where the contracts themselves had been terminated by mutual consent—all done under the guise that receivership gave complete absolution and permits the reinsuring company to retain the benefit of the insurance business written by petitioners without assuming the burdens inseparable therefrom.

One of the respondents has argued that petitioners should have appealed from the decree of August 22, 1934, if they were not satisfied with it. Manifestly, petitioners could not have appealed from a decree in a proceeding to which they were not parties, and if they had intervened they probably would be deemed to have taken the case as they found it, even assuming that the court would have permitted intervention, which is doubtful in view of the construction subsequently given the decree, to-wit: That it deprived plaintiffs of all their rights, so that they would have had no standing as intervenors.

The net result is that petitioners were given no notice or opportunity to be heard prior to the entry of a decree which has been interpreted by the courts of Illinois to deprive them of all their rights. This is not due process of law under any view of the Constitution.

It is by no means clear that the Circuit Court of Peoria County in entering the decree of August 22, 1934, complained of, which "disaffirmed" petitioners' contracts, had in mind the destruction of said contracts as to commission

interests already fully earned and acquired by petitioners. This is immaterial, however, since, whatever the Circuit Court may have had in mind, the Appellate and Supreme Courts of Illinois have given that effect to the Circuit Court's decree.

The Appellate and Supreme Courts of Illinois have construed said decree to destroy petitioners' rights to renewal commissions earned prior to November 15, 1933, and have, therefore, by their opinions themselves deprived petitioners of their property without due process of law. That neither the Circuit Court nor either of the respondents had in mind the full effect subsequently given its decree by the Appellate and Supreme Courts is indicated by the fact that the Receiver has paid to petitioners commissions on renewal premiums paid into the Peoria Life prior to the date of receivership but not paid to petitioners prior to that date. If the holding of the Supreme Court of Illinois is correct then the Receiver should not have paid said renewal commissions to these agents. This leads petitioners to believe that the decree of August 22, 1934, correctly interpreted, has no other effect and should be given no other effect than did the appointment of the receiver, that is, to terminate the right of the agents to act after the date of receivership in securing applications, writing policies, etc. See the case of *C. B. & Q. Ry. Co.* v. *Chicago,* 166 U. S. 226.

2. Petitioners Do Not Stand Merely in the Position of Creditors Entitled Only to a Pro Rata Share in the Assets of the Peoria Life, Since the Receivership of That Company Was Not a Liquidation in the Sense of a Sale of Assets and a Pro Rata Distribution to Creditors.

It is the opinion of the Supreme Court of Illinois that the Reinsurance Agreement was only a step in the liquida-

tion proceedings of the Peoria Life and that there is no merit in the contention of petitioners that by the provisions of said Reinsurance Agreement, the Alliance Life is not a purchaser but is a reinsurer and something more, inasmuch as it took over all the business of the Peoria Life and, therefore, assumed all the burdens inseparable therefrom; and that for all practical purposes the Alliance Life stands in place of the former company and is, therefore, liable for commissions to petitioners and other agents whose efforts created a large portion of the insurance business of the Peoria Life now enjoyed by the Alliance Life.

That the Reinsurance Agreement was not a move to liquidate the affairs of the Peoria Life is shown by an order entered in the receivership proceedings November 23, 1933. This order was entered to authorize the Receiver to pay to other insurance companies premiums on policies which the Peoria Life had reinsured in those companies. Paragraph (5) thereof (Additional Abst. 12) says in part:

> "That said Receiver, pursuant to the order of this Court, expects to solicit written proposals for contracts for the reinsurance, rehabilitation, or reorganization of the respondent, and that it is for the best interests of said Company and its policy holders, creditors, and all parties having an interest in said company, to maintain, protect and conserve the business and good-will of respondent, pending the order of this Court, upon any bids which may be made for the reinsurance, rehabilitation or reorganization of the respondent, • • •"

The same order recites in Paragraph (e) (Additional Abst. 15, Rec. 55-58):

> "That in no event shall the Receiver pay any premium on any such contract of reinsurance unless the company to which said premium shall be paid shall issue to the Receiver at the time of such payment a receipt therefor, in which said reinsuring company shall agree to return such reinsurance premium to the Receiver, should the Peoria Life Insurance Company

not be reinsured, reorganized or rehabilitated by order of this Court, and the Company be liquidated in accordance with the original order of liquidation entered in this Court on the 15th day of November, 1933."

The foregoing quotations show eloquently what was actually in the minds of everyone concerned immediately after the bill for receivership was filed; that is, that the liquidation should be abandoned and the business rehabilitated and reinsured, and this is what actually was done.

The final paragraph of said order (Additional Abst. 16-17) provided:

"It is further ordered, adjudged and decreed that jurisdiction of this cause and of the parties hereto be, and the same is hereby reserved and retained by the Court for the purpose of further modifying, extending or changing the orders entered in the above entitled cause on November 15, 1933, directing the said Receiver to liquidate the assets and affairs of said respondent to the extent necessary or advisable in the opinion of the Court, in order to consummate any plan or contract of reinsurance, rehabilitation or reorganization of said respondent, which shall be approved by the Court."

As further evidence that liquidation was abandoned and replaced by rehabilitation through reinsurance, petitioners call attention to the preamble of the Reinsurance Agreement approved by the Court which (Abst. 52) recites:

"Whereas a large part of the assets of the Peoria Life Insurance Company is invested in that class of securities which has depressed greatly with current depression markets and a great loss would accrue to the policy holders of such company, their beneficiaries and their dependents, if forced liquidation of all assets were undertaken in present markets."

Attention has already been directed to the provision of Paragraph 3 of the decree of August 22, 1934 (Abst. 45), finding that the policies of Peoria Life "* * * are hereby revived and renewed".

It was expressly provided in the decree approving the Reinsurance Agreement that all policy holders who did not expressly dissent therefrom should be bound by said decree and, as a matter of fact, the assenting policy holders were in the great majority. As to policies written by petitioners whose holders dissented from the new arrangement, petitioners make no claim except for commission accrued and unpaid at the date the bill for receiver was filed. The assenting policy holders are in a different category. As to them there was actually no receivership but rather a rehabilitation proceeding, their policies continuing in force uninterruptedly and the premiums being paid thereon remaining the same so far as is material here.

As further proof that as to the dissenting policy holders there was no true liquidation, it may be stated that the Alliance Life paid nothing for the business reinsured, is not obligated to make any payment therefor, is recompensed for all its work in connection with said business by a schedule of fees and charges contained in the Reinsurance Agreement, and is entitled to the benefit of the appreciation in the assets of the Peoria Life and to take over the entire business as its own property on January 1, 1949.

3. But Even in the View of This Case That the Receivership of the Peoria Life Was a True Liquidation, Petitioners Have Been Deprived Without Due Process of Their Rights as Creditors.

Up to now, we have presented this case from the standpoint that petitioners have a vested property right in all the renewal premiums which have been and are being paid from time to time on the outstanding policies of the Peoria Life written by them and now taken over by the Alliance Life.

The case has another aspect, however, and that is as

to the rights of the petitioners to the present value of their renewal commissions because of the receivership and transfer of the business and assets to another Company and the refusal of the receiver and the Reinsuring Company to pay. A leading case on this subject in which numerous decisions affecting not only the right to recover under these circumstances, but also the measure of damages are discussed is *Wells* v. *National Life Insurance Association,* 99 Fed. 22.

Plaintiff there entered into a contract by which he became the General Agent for an Insurance Company for a term of years within a specified territory. He was to have charge of the territory and to devote his services to the business of establishing sub-agents, etc., and his sole compensation was made up of commissions on the initial and renewal premiums received from the business he secured. It was held, in an action for breach of the contract by the defendant in transferring the business to another agent during the term without just cause, that the plaintiff might show as a measure of damages the commissions which would have accrued to him under the contract from the renewal commissions under policies actually written by him, and also the amount of new business done by the defendant within the territory through the new agents and that these factors were proper to be considered by the jury.

In discussing the manner of assessment of damages, the court in its opinion in the *Wells* case refers to the following: *Aetna Life Ins. Co.* v. *Nexsen,* 84 Ind. 347; *Lewis* v. *Atlas Mutual Life Ins. Company,* 61 Mo. 534.

The cases cited hold that such damages are not too remote, speculative or uncertain. Computation of the present value of renewals is a common actuarial practice, recognized and used by all Insurance Companies and recognized and used by the Peoria Life some years prior to receivership in computing the valuation at which Peti-

tioner Logan purchased the interest of the General Agent whom he succeeded.

This general principle of damages for an anticipatory breach is summed up conclusively in the leading case of *Lovell* v. *St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, where the court said:

> "Where one party to an executory contract prevents performance, or puts it out of his power to perform, the other party may regard it as terminated and demand damage he has sustained thereby."

In discussing the rights of petitioners, we can not overlook the sound, basic principle of law which has been repeatedly pronounced by this court with reference to damages for an anticipatory breach. It was held in the leading case of *Roehm* v. *Horst*, 178 U. S. 1, that the anticipatory breach of an executory contract might properly be the subject matter for damages and that the plaintiff therein was entitled to compensation for the damages he sustained by the breach of the other party down to the time of complete performance.

In this case, however, Respondents have argued and the court has ruled that the original decree of liquidation of the Peoria Life makes the proceeding comparable to a bankruptcy action in establishing a permanent barrier to the enforcement of the vested rights of petitioners. Adopting this argument for the moment; namely, that this receivership is comparable to bankruptcy, it is interesting to find that the case of *Central Trust Co.* v. *Chicago Auditorium Ass'n*, 240 U. S. 581, holds that rights similar to those asserted here are provable in bankruptcy and that a claimant is entitled to the full amount of the damages caused by the anticipatory breach.

In the *Auditorium* case, a Livery Company made a contract for a term of years to handle the livery business for the Auditorium Hotel in Chicago. The Livery Company

had engaged in the performance of its contract for only about six months of the five year term covered by the agreement when it was forced into bankruptcy. Certain specific payments were to be made by the Livery Company for the privileges provided, which amounts were definitely specified and payable monthly. The claim of the Hotel was allowed for the portion accrued prior to bankruptcy, but both the District Court and the Circuit Court of Appeals decided that the Hotel could not collect for the balance of the term.

This court, however, in its opinion held that the Hotel had a provable claim for the entire term, since the contract was in full force and effect at the date of bankruptcy and that the intervention of bankruptcy constituted such a breach as to entitle the claimant to full allowance.

It should be remembered that in the present case the contracts were no longer executory, having been fully performed by petitioners prior to the receivership. If the anticipatory breach of an executory contract is a provable claim in bankruptcy, how much more force must be given to the claim of a party who, having fully executed his contract and obtained a vested interest in his compensation thereunder, presents his claim for allowance in bankruptcy. Adopting, for argument only, the proposition that the receivership in this case is kindred to bankruptcy, we can come to no other conclusion than that petitioners have a proper provable claim against the receiver and that damages should be awarded to them.

The opinion of the Supreme Court of Illinois recognizes that petitioners have asserted their claims, both as against the receiver of the insolvent Company and against the reinsuring Company, but it grants no recovery or remedy against either. By its judgment in this regard, petitioners have been inequitably and unfairly discriminated against as compared with other creditors of the Peoria Life whose

claims have been allowed and paid and have thereby been deprived of their property without due process of law.

4. Each Petitioner Had an Absolute Vested Property Right in His Renewal Commissions in the Amount Fixed by His Agency Contract on Every Policy Written by Him, From the Moment the Policy Was Issued by the Company.

(a) *This has been established as the law in similar cases.*

Petitioners were to receive their renewal commissions as premiums were paid. These commissions were under the terms of their contracts to be paid solely for their original work in securing the policies. Once the policies were written, the agents had fully performed and nothing more remained to be done by them. This fact is not in dispute. It is petitioners' contention that once they wrote a policy of insurance, they had a vested right therein in the amount of their commission interest, so long as premiums continued to be paid.

A case clearly sustaining this proposition is *General American Life Ins. Co.* v. *Roach*, 179 Okla. 301, 65 Pac. (2) 458 (Okla. 1937). In the *Roach* case, the agent had an original contract with the International Life Insurance Company, which company was subsequently acquired and all its contractual obligations assumed by the Missouri State Life Insurance Company. In 1933 this latter company became insolvent and was taken over by the Superintendent of Insurance for the State of Missouri, who acted directly, as provided by the law of that state, in lieu of appointing a receiver. Later, the Superintendent of Insurance, with the approval of the court, entered into a reinsurance contract with the General American Life, defendant in the *Roach* case. In the reinsurance contract it was provided that:

"The new company does not assume any obligation

under any contract whatever made or assumed by the old company with any agent, whether manager, supervisor or otherwise, but as a part of this agreement and as a condition precedent to its acceptance, it is agreed that all such contracts and all contracts of whatever kind and character for personal service shall be cancelled and terminated as of or prior to the date of the execution of this agreement."

The Oklahoma Supreme Court in the *Roach* case held that the agent not only had a property right vested in him from the moment that he sold the policy, entitling him to all renewal commissions provided by his agency contract, but also that the attempt which was made to reduce it to the extent of a lien percentage of fifty per cent was of no effect. Quoting from the decision (p. 460, as reported in Pacific Reporter, 2d Series):

"We believe that Roach's right to receive five per cent of the renewal premiums became vested as soon as the policy has been taken. (*Hale* v. *Brooklyn Life Ins. Co.*, 46 Hun. 274); that this right is his property, and when a renewal premium is received by the collecting company, his share thereof is held for him (*Michigan Mutual Life Ins. Co.* v. *Coleman*, 118 Tenn. 215, 100 S. W. 122); and this right existed so long as the policy continued in existence and payments were made by the policy holders, limited in time by the contract (*Hercules Mutual Life Assurance Society* v. *Brinker*, 77 N. Y. 435).

* * *

"When payment of the renewal premium is made by the policy holders to the collecting company, the interest of the plaintiff therein, and the right to receive the same attaches thereto simultaneously with the collection. That percentage of such premiums belongs to the plaintiff and never is the property of the defendant. In our opinion, taking into consideration the contractual relations between the parties, the International Life Insurance Company and its successor, including the defendant, stood in a trust capacity toward the plaintiff."

The court in its opinion in the *Roach* case discusses various provisions common to these agency contracts, many of which are substantially identical with those appearing in the contracts of petitioners. There is a provision, for example, that the Insurance Company is to have a lien upon any money in its possession, including renewal commissions belonging to the agent, to secure any indebtedness of the agent to the Company. There is the provision that the commission shall accrue only as the premiums are paid to the Company in cash; and there is the further provision that if the Company should refund any premium on any policy, the agent must repay on demand any commission received on such premium.

Commenting upon these matters, the court says in the *Roach* case (p. 460), as reported in the Pacific Reporter, 2nd Series:

> "That a portion of the renewal premiums collected belong to the plaintiff coincidental with collection is clearly indicated by the provisions of the contract. * * * The Company is to have a lien upon any moneys in its possession belonging to the agent, to secure agents' indebtedness to the Company. There are other provisions in the contract not as material as these, but which lend to support these, and nothing in the contract is susceptible of a contrary interpretation. Agent could not create a lien upon something which was not his, therefore, he by giving and the Company by accepting the lien, definitely stamped the percentage collected as the agents. In addition, under certain circumstances, agent was to pay Company for its services in collecting his percentage. The conclusion that both treated this percentage as his is inescapable."

Another case from Oklahoma squarely in favor of petitioners' contentions here is the case of *Alliance Life Insurance Company* v. *Landrum*, No. 29090 in the Supreme Court, State of Oklahoma, handed down March 12, 1940, and reported in 101 Pac. (2) 1058 (Advance Sheets only), rehearing denied April 2, 1940.

In the *Landrum* case the defendant Alliance Life is the same Alliance Life Insurance Company which is a respondent here. The plaintiff Landrum was a former agent of the Old Colony Life Insurance Company, an Illinois corporation which had been placed in receivership in 1932 under the same statute under which the Peoria Life receivership was instituted. The Old Colony Life Insurance Company was reinsured by the Alliance Life, the Respondent here.

As in the instant case, the Alliance Life refused to pay Landrum renewal commissions on insurance policies written by him for the Old Colony Life Insurance Company and subsequently acquired by the Alliance Life under its reinsurance agreement, and, therefore, suit was instituted. The reinsurance agreement in question, like that in this case, provided that the Reinsuring Company did not assume any of the agency contracts of the Company reinsured. From a judgment of the District Court of Oklahoma finding in favor of the agent and ordering an accounting, the Alliance Life appealed. The Supreme Court of Oklahoma sustained the judgment of the District Court in its entirety and remanded the case, with directions to proceed with an accounting.

In seeking to discover why the *Landrum* case was not reported in the bound volume of the Pacific Reporter and the Oklahoma State Reports, petitioners learned that the opinion in that case was withdrawn and vacated by the Oklahoma Supreme Court under date of June 11, 1940, subsequent to the filing in that court of a satisfaction of judgment dated June 8, 1940, wherein the plaintiff Landrum acknowledged full payment, settlement, and satisfaction of the judgment previously entered in his favor against the Alliance Life.

The basis for the *Roach* and *Landrum* decisions is not new or novel, but this same proposition of law has followed down through the years, recited again and again by courts of last resort in leading jurisdictions of this country.

In the case of *Michigan Mutual Life Ins. Company* v. *Coleman,* 118 Tenn. 215, 100 S. W. 122, the question involved was whether the agent's interest in renewal premiums paid to the Company was forfeited on his discharge. The court held that it was not and that the General Agent in sacrificing the greater part of the first year's commission to some sub-agent was not only clearly augmenting the Company's business, but was building up for himself a vested estate in renewals.

In *Hale* v. *Brooklyn Life Ins. Co.,* 46 Hun. (N. Y.) 274, suit was brought to recover commissions on renewal commissions received by the Insurance Company. Judgment was rendered for the agent, the court saying:

> "During the existence of the contract, the plaintiff's right to commissions on premiums received by the Company after the premium for the first year had been fully paid becomes vested as soon as the plaintiff caused a policy to be taken out. The subsequent abrogation of the contract of employment by mutual consent would not deprive him of his right. So far as the contract remained executory, the agreement to terminate it destroyed it as to both parties but to this extent it had been executed by plaintiff, and the mutual abandonment of the contract would not take away his right to renewal commissions already earned, any more than the expiration of the contract by the efflux of time would have done at the end of a year from the date of the agreement. In any action for goods sold or delivered, the plea that the sale and delivery were made under a contract which has subsequently been wholly annulled and rescinded by both parties constitutes no defense. (*Edwards* v. *Chapman,* 1 Mess. & W. 231.) So far as the policies are concerned on which the plaintiff claims renewal premiums, the Insurance Company has derived all the benefit which was intended under the contract, and the agreement to rescind does not bar the agent from recovering his just compensation."

In the *Hercules Mutual Life Assurance Society* v. *Brinker* case, 77 N. Y. 435, suit was brought by an Insurance Company against an agent for an accounting. The agent set up a claim against the Company or its receiver for renewal commissions, which had been collected by the Company but not paid. *Held,* it was liable to pay these commissions. We refer the court to the fine discussion contained in the opinion in this case with reference to the interest of the agent in renewal premiums and his right to recover his commissions from his principal or its successor.

Another leading case on this subject was decided by the Supreme Court of Iowa and has had frequent citation ever since it was handed down. In *Schrimplin* v. *Farmers' Life Assurance Company,* 123 Iowa 102, 98 N. W. 613, the Bankers Guaranty Life Association agreed with the agent that he should receive one dollar per year on each one thousand dollars insurance obtained by him, such payments to continue as long as the policies remained in force. Subsequently, the Bankers Guaranty was absorbed by the defendant, and the assets and business of the old Association were transferred to the new Company. The new Company attempted to repudiate all obligations to the agent. Thereupon, the agent brought suit, contending that he had the same interest in the renewals that he had prior to the transfer. The suit was in the nature of an accounting for commissions on premiums already collected.

The Supreme Court of Iowa allowed recovery and in the course of its opinion, said, in part, page 615, as reported in the Northwestern Reporter:

> "It may be true that his claim of a continuing interest in the renewals was something of an encumbrance upon the future income of the association. But the same may be said of any debt or obligation payable in the future. No attempt is made to show that the compensation for plaintiff's services, as provided by the contract, is unreasonable or extravagant in amount, or

> that the contract was obtained by fraud or by collusion with the officers of the association. • • • If the agent secures no business for the Association he receives no pay, but if he does secure business, then the income received therefrom is charged with the agent's agreed commission or share; in other words, the business procured by him pays its own expenses. Nor is there anything essentially vicious or wrong in agreeing to pay the agent some reasonable compensation from renewals received upon the insurance negotiated by him. *Such contract, as is well known, has the sanction of long usage in the insurance world.* • • •"

In the present case it is clear that the Alliance Life, which had already been in the insurance business for many years under the corporate name of Life & Casualty Company of Chicago, executed the reinsurance contract with the receiver with its eyes open and with full knowledge that insurance agents customarily have an interest in renewal premiums. That it did know this to be the situation in the Peoria Life case is shown by the fact that in the reinsurance agreement it sought to repudiate the obligation.

(b) *The right of an insurance agent to his renewal commissions is so definitely vested at law that his trustee in bankruptcy or an assignee for benefit of creditors can demand payment of them.*

In re Wright, 157 Fed. 544.

Knevals v. *Blauvelt*, 82 Maine 458, 19 Atl. 818.

Green v. *Bartholomew*, 34 Ind. 235.

(c) *Petitioners have a property right in the nature of an equitable lien which attaches to each premium on policies written by them, as it is paid, to the extent of petitioners' renewal commission interest therein.*

Barnes v. *Alexander*, 232 U. S. 117.

Geddes v. *Reeves Coal & Dock Co.*, 20 Fed. (2nd) 48.

U. S. Fidelity & Guaranty Co. v. *Fidelity Trust Co.*, 153 Pac. 195 (Okla.).

Pomeroy, Equity Jurisprudence, Vol. 3, Sections 1235, 1236, and 1237.

(d) *As either respondent receives premiums on policies of insurance written by petitioners, an implied trust is created, and such respondent becomes a trustee for the benefit of petitioners of their renewal commission interest in such premiums.*

General American Life Ins. Co. v. *Roach*, 179 Okla. 301, 65 Pac. (2) 458.

Geddes v. *Reeves Coal & Dock Co.*, 20 Fed. (2) 48.

Bogert, Trusts and Trustees, Vol. 3, Sec. 471.

5. Petitioners' Rights Were Not Dependent on the Continued Existence of the Peoria Life Insurance Company as Such, or Upon Any Other Person or Thing the Destruction of Which Could Destroy Petitioner's Rights.

In the opinion of the Illinois Supreme Court in this case, it is said (376 Ill. 517, 521-2):

> "In contracts which require the continued existence of the particular person or thing, the destruction or death of that person or thing will terminate the agreement. (*Martin Emerich Outfitting Co.* v. *Siegel Cooper & Co.*, 237 Ill. 610; 2 Restatement of Contracts, sec. 458.) The agency contracts here in question were necessarily, and as a matter of law dependent for their continued existence upon the lawfully continued existence of the Peoria Company and the parties are conclusively presumed to have entered into those contracts in contemplation of the possibility of the insurance company's insolvency and its liquidation under the Insurance Liquidation act above cited."

The case of *Martin Emerich Outfitting Co.* v. *Siegel Cooper & Co.*, 237 Ill. 610, cited by the court, was a case in which the Emerich Company rented space in Chicago from Siegel Cooper & Co. for a term of five years. About a year after the execution of the lease the building was partially destroyed by fire and the lessees moved out. This was an

action in assumpsit by the lessee to recover damages for the breach of a written contract. The holding was that because the building was untenantable and incapable of being repaired Siegel Cooper & Co., lessors, were excused from future performance under the lease.

If the case now before the court was a suit by the petitioning agents for damages because they were not permitted after November 15, 1933, to solicit further policies of insurance, the Emerich case might be applicable, but such is not the situation. Petitioners are not seeking damages for the loss of the privilege of soliciting insurance after the bill for receivership was filed, but are suing for compensation for services wholly performed before that date, and the Emerich case, since it was not a suit in which lessee had paid the rent for the full term before the fire, is not applicable or pertinent here.

Furthermore, petitioners' contracts clearly contemplated that renewal commissions would be paid so long as the policies remained in force, regardless of the continuation in business of the Peoria Life Insurance Company. Section 31 of Petitioner Curnow's contract, for example (Abst. 87-88; Rec. 193), provides that in case governmental authorities should make regulations or enact laws, or should other contingencies arise or conditions exist, making it undesirable or inexpedient for it to continue to transact business, the Peoria Life reserves the right and has the right to withdraw from doing business and to terminate its contract with the agent, in which event it is provided however that the agent shall have no claim against the Company for compensation except for *commissions previously acquired*, nor shall any lien of Company upon any commission interest of the agent be affected.

Respectfully submitted,

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